IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

Second Appeal No. 1425/2001
(Old No. 1648/1984)

1- Kabool Ahmad S/o Nahar Ali (Deceased)
R/o Village Rajpur Maustfabad alias
Gandharauna, P.O. Landhoura, Pargana
Manglour, Tehsil Roorkee, District
Saharanpur.

1/1. Roa Jamshed S/o Kabool Ahmad
R/oVillage Rajpur Mustfabad alias
Gandharauna, P.O. Landhoura,
Pargana Manglour, Tehsil Roorkee,
District Saharanpur (now District
Haridwar) .....Appellant.

Vs

1. Mohabbat Ali S/o Rahmat (Deceased)
R/o Village Rajpur Mustafabad alias
Gandharauna, P.O. Landhoura,
Pargana Manglour, Tehsil Roorkee,
District Saharanpur.

1/1. Smt. Hashmi W/o Mohabbat Ali
½. Shamshiha D/o Mohabbat ali R/o
Village and P.O. Jaqqar Tehsil Hardwar
District Saharanpur (now District
Haridwar).
1/3.Masoom Ali S/o Rehmat R/o Vilalge
Rachpur Mustafabad @ Gandharouna, Post
Office Landhaura, Pargana Manglour,
Tehsil Roorkee, District Saharanpur
(Now District Haridwar) .... Respondents

Sri Alok Singh, Learned Senior Advocate, for the appellant.
Sri P.M.N. Singh, learned Senior Advocate, assisted by
Ms. Prabha Lauliyal, learned counsel for the respondents.

Hon'ble B. C. Kandpal, J.

This second appeal, U/S 100 C.P.C. has been preferred by the defendant, against the judgment and decree dated 11-4-1984, passed by the District Judge Saharanpur, in Civil Appeal No. 253 of 1980, dismissing the appeal and confirming the judgment and decree

dated 11-4-1979 passed by the Civil Judge, Roorkee in O.S. No. 12 of 1977 Mohabbat Ali Vs. Qabool Ahmad, whereby the suit was decreed for the recovery fo Rs. 13,600/- along with interest pendentelite and future.

2- Brief facts of the case are that the plaintiff-respondent Mohabbat Ali (since deceased) filed the suit against the defendant Qabool Ahmed (now deceased) for the recovery of Rs. 13,600/- with interest on the ground that the defendant had executed a sale deed on 10-10-73 in favour of the plaintiff. It was discovered that he had already executed a sale deed on 1-10-1973 in favour of one Saghir Ahmed. This fact came into notice during the mutation proceedings and the plaintiff was deprived of the property, hence the suit was filed for the recovery of the amount paid as sale consideration and interest.

3- The defendant contested the suit on the allegations that the plaintiff fully knew about the sale deed executed by him in favour of Saghir Ahmed and the sale consideration was taken back out of the office of the Registrar and nothing remained due.

4- On the pleadings of parties, the following issues were framed in the suit:-

1- Whether the plaintiff is entitled to the award of Rs. 18,600/- as alleged in the plaint?.
2- Whether the sale deed in favour of the plaintiff is collusive and fictitious and no consideration was paid as alleged in the written statement?.
3- Whether the defendant has returned Rs. 5,400/- to the plaintiff as alleged in the written statement?.
4- Whether the suit is time barred?.
5- Relief?.

5- The case was fixed for final hearing on 11-4-1979 on which date the defendant applied for adjournment which was refused and the case was ordered to proceed under Order 17 Rule 3 of the C.P.C. The statement of plaintiff Mohabbat Ali was recorded and the Civil Judge decided the case on merits under Order 17 Rule 3 C.P.C. Thereafter, the suit was decreed for the recovery of Rs. 13,600/- with interest pendentelite and future.

6- Feeling aggrieved the defendant preferred appeal before the District Judge, Saharanpur, which was dismissed vide impugned judgment and decree dated 11-4-1984.

7- Thereafter, the defendant/appellant preferred this appeal before the Allahabad High Court, which has been transferred to this court after creation of new State.

8- At the time of admission of the appeal, the following substantial question of law has been framed:

> "Whether it is open to the court hearing an appeal against ex-parte decree to go into the ground of non-appearance of the defaulting party?. If so under what circumstances?.

9- Heard learned counsel for the parties and perused the record.

10- The record shows that the case was fixed before the trail court for final hearing on 11-4-1979 and on the said date the defendant/appellant moved an application for adjournment, which was refused and the case was directed to proceed under Order 17 Rule 3 for the C.P.C. The statement of the plaintiff/respondent Mohabbat Ali was recorded and the trail court decided the case on merit under Order 17 Rule 3 C.P.C. by decreeing the

suit. The defendant/appellant filed the appeal against the judgment and decree passed by the trial court, but the same was also dismissed by the appellate court vide judgment and order dated 11-4-1984. The lower appellate court has clearly observed that the defendant/appellant was trying to prolong the hearing of the case by taking one pretext or the other. The lower appellate court has also observed that the cost imposed upon the defendant/appellant was not paid, even on the next date of hearing. The lower appellate court has also observed that the issues in the suit were settled on 23-2-1978 and 1-3-1978 was fixed for final hearing.

11- The record reveals that the defendant/appellant took first adjournment on 6.5.1978 which was allowed on payment of Rs. 20/- as cost and 18-5-1978 was fixed for final hearing. On 18-5-1978 the case was also adjourned on the application of the defendant. Thereafter, the case could not be taken up by the trial court for one reason or the other and unconnected with the adjournment of the parties. The defendant sought further adjournment on 12-1-1979, which was allowed on payment of Rs. 35/- as cost. It was directed in this order that the case had become quite old and several dates have been fixed in the case. The defendant should come prepared for evidence. The defendant moved another application, paper No. 38-D, for adjournment on 14-2-1979, seeking 15 days' time to move amendment application, which was allowed on payment of Rs. 45/- as cost and it was ordered that let the entire costs be paid by 3-3-1979, failing which the defence shall be struck-off. On 3-3-1979, the defendant sought 25 days' time to pay costs vide application paper No. 39-D. This application was ordered to be put up before the counsel for the parties, but no order appears to have been passed

on the said application. On 12-3-1979 the defendant again applied for adjournment vide application 40-D, which was allowed on payment of Rs. 45/- as cost and 26-3-1979 was fixed for final hearing. On 26-3-1979, the Presiding Officer was not present and the case was adjourned to 11-4-1979. On 11-4-1979, another application was moved for adjournment by the defendant on the ground that his grand son was involved in some accident at Delhi and the defendant had gone there. There is nothing on record to indicate that the costs awarded by the trial court, were paid by the defendant and there is no indication of the compliance of the court's orders. The defendant, as the record show, continuously sought adjournments on one pretext or the other.

12- It is, therefore, quite clear that the defendant/appellant, who was prohibited from entering into the defence till the cost was not paid, did not in fact case to pay the cost in spite of time granted to him to do so and the date on which the defence was struck-off and the case proceeded against the defendant/appellant under Order 17 Rule 3 C.P.C., the defendant/appellant was absent. The record reveals that the *pairokar* of the defendant/appellant was present and even the counsel, who was present in the court campus, did not come to court to press the application for adjournment. It is settled law that in the event of a party failing to pay costs on the date next following the date of the order imposing the cost, it is mandatory for the court to disallow the prosecution of the suit or the defence, as the case may be. If an adjournment is sought and the same is granted on payment of cost, then on the next date of hearing the party, who sought adjournment, is bound to pay the costs. The court is only required to see whether the costs.

have been paid or not and if an part does not pay the costs, then the only course open to the court is to disallow the prosecution of the suit or the defence, as the case may be.

13- In the light of the material available on record, it is quite clear that the trial court was justified in refusing the defendant/appellant to participate in the proceeding and in striking-off his defence for non-compliance of the court's orders relating to costs. The record further reveals that on the date fixed, the case was adjourned on the application of the defendant/appellant, but the evidence could not be recorded and as the defendant/appellant failed to appear on the adjourned date, the case would be covered by Order 17 Rule 2 C.P.C. and not by Order 17 Rule 3 C.P.C. It is, therefore, quite clear that where the court on non-appearance of the defendant even if expressly proceeded to decide the case under Order 17 Rule 3 C.P.C. instead of deciding it ex parte under Order 17 Rule 2 C.P.C. the defendant was not precluded from moving an application under Order 9 Rule 13 C.P.C. for setting aside such a decree. The instant case thus would fall under order 17 Rule 2 C.P.C. and not under Order 17 Rule 3 C.P.C. notwithstanding the express mentioning of the Order 17 Rule 3 C.P.C. by the trial court and as such the application for setting aside the ex-parte decree under Order 9 Rule 13 C.P.C. would be maintained.

14- On the basis of the aforesaid assessment of the evidence, I come to the conclusion that the present second appeal does not bear any merit. Both the courts below have recorded concurrent finding of facts, which cannot be disturbed at the stage of second appeal. The

substantial question of law formulated by the court is answered against the defendant/appellant.

15- Accordingly the appeal is dismissed. The impugned judgments and decrees passed by both the courts below are hereby confirmed. The interim order, if any, passed in the appeal, shall stand vacated.

(B.C. Kandpal, J.)

Dated: November 03, 2006.
ISB